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Supreme Court

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NO. _____

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ALABAMA,

PETITIONER - APPELLEE,

V.

CHARLES HANSBROUGH,

RESPONDENT - APPELLANT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[28 U.S.C. §2254 PROCEEDINGS]

PETITION FOR WRIT OF CERTIORARI

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22 pp

QUESTIONS PRESENTED FOR REVIEW

I. In light of Brown v. Allen, 344 U.S. 443 (1953) and Coleman v. Thompson, 501 U.S. 722 (1991), both of which imply that the time and manner for perfecting an appeal from conviction is a question of state law, did the Court of Appeals for the Eleventh Circuit exceed the scope of habeas corpus in holding that Respondent could have his claims heard in federal habeas corpus in an instance where the Respondent had lost the right to have his claims heard on appeal in state court due to the refusal of the Alabama Court of Criminal Appelas to reinstate his notice of appeal which had been knowingly and voluntarily withdrawn by a motion filed in that court?

II. Where the Respondent sought to be excused from procedural default in state court on the theory that the state court did not follow a "firmly established and regularly followed state practice" in denying his motion

to reinstate his notice of appeal, did the Respondent satisfy his burden of proof merely by showing that no state appellate rule nor any reported case decision contained any provision disallowing a reinstatement, but failed to show that the Alabama Court of Criminal Appeals had arbitrarily exercised its inherent authority to grant reinstatement to other defendants while denying reinstatement to Respondent?

THE PARTIES

The caption contains the names of all the parties to the proceedings in the court below.

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OPINIONS BELOW

1. The original opinion of the United States Circuit Court of Appeals for the Eleventh Circuit reversing the decision of the District Court and the granting of the writ is non-published. It is contained in Appendix "A".

The Recommendation of the Magistrate Judge and the Order of the District Court are contained in the attached Appendix "B".

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit which is sought to be reviewed was rendered on March 14, 1994. This Court has jurisdiction under 28 U.S.C. §1254(1), as amended (by Public law 100-352) on June 27, 1988.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V (in pertinent part)

"No person ... shall be deprived of life, liberty or property, without due process of law"

made applicable to the states through the XIV Amendment to the Constitution of the United States.

Amendment XIV (in pertinent part):

"Nor shall any state ... deny to any person within its jurisdiction the equal protection of the laws".

STATUTORY PROVISIONS INVOLVED

Rule 42, Alabama Rules of Appellate Procedure (1975 as amended)

Appendix "C"

Rule 4(b)(1), Alabama Rules of Appellate Procedure (1975 as amended)

Appendix "D"

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

A. PROCEEDINGS BELOW

Respondent, Charles Hansbrough was indicted by the October 1989 Session of the Grand Jury of Jefferson County for attempted theft first degree in violation of §13A-8-3, Code of Alabama

(1975) and for possession of forgery devices in violation of §13A-9-9, Code of Alabama (1975). The Honorable William K. Delgrosso was appointed to represent Respondent. However, Respondent and his wife, who was also charged, decided to represent themselves. Respondent's case came up for trial on February 27, 1990 and on that same day, Respondents was convicted as charged in the indictments. He was pronounced guilty on March 2, 1990, and on April 20, 1990, he was sentenced to twenty (20) years on each conviction with the sentences to run concurrent.

Respondent gave oral notice of appeal after his sentencing on April 20, 1990.

The Petitioners adopt the procedural history of Respondent's state appellate proceedings as contained in the Magistrate-Judge's report and recommendation (R1-25-2-4) to wit:

> "After giving oral notice of appeal on April 20, 1990, as authorized by Rule 3(a)(2) of the Alabama Rules of Appellate Procedure, petitioner filed three post-conviction motions. Identified as "Motion for New Trial - A," "Motion for New Trial - B," and

"Motion for Judgment of Acquittal," all filed on May 17, 1990, only the "Motion for New Trial - B" is pertinent to the issues now asserted in the instant habeas action. Although "Motion for Judgment of Acquittal" apparently was not ruled upon, both motions for new trial were denied by the trial court on May 22, 1990.

While petitioner's case was pending on direct appeal, he discovered the trial court had appointed his stand-by counsel to represent him on appeal. Not wanting to be represented by counsel and wishing to pursue his appeal pro se, he filed a motion to withdraw his oral notice of appeal on June 8, 1990. Thereafter, on June 15, 1990, the Alabama Court of Criminal Appeals dismissed the appeal "on motion by appellant...." Thirteen days later, on June 28, 1990, petitioner filed his written "Pro Se Notice of Appeal." In that notice, petitioner expressly stated that he had withdrawn his oral notice of appeal because an attorney was erroneously listed as his counsel of record on appeal. Furthermore, petitioner stated that he wanted to appeal from the court's judgment of conviction on March 2, 1990, the denial of his motions for new trial on May 22, 1990, and other motions set out in the notice. On July 18, 1990, however, the Alabama Court of Criminal Appeals entered an order that "said appeal be and stand stricken in this court below."

On August 27, 1990, once again the petitioner filed a "Pro Se Notice of Appeal" purporting to appeal from the

> judgment of conviction, the sentencing order, and the denial of his Motion for Judgment of Acquittal. But, once again, on November 2, 1990, the Alabama Court of Criminal Appeals entered an order dismissing the appeal "as [un]timely filed."

On July 25, 1991, the Magistrate-Judge entered a Report and Recommendation that the petition be denied on the ground that Respondent had procedurally defaulted in state court by dismissing his notice of appeal.

The District Court entered an order on September 12, 1991, adopting the Report and Recommendation (R-1-25).

The Court of Appeals for the Eleventh Circuit grant a certificate of probable cause on June 19, 1992 (R. 1-31).

On January 7, 1994, the Court of Appeals for the Eleventh Circuit affirmed the district court's finding that Respondent had committed a procedural default. Nevertheless, the Eleventh Circuit reversed the district court's dismissal of the petition, holding that since the Alabama Rules of Appellate Procedure contained no

provision regarding the reinstatement of notice of appeals and since there were no reported state cases which hold that a voluntary dismissal of an appeal is with prejudice so as to bar a subsequent appeal, the refusal of hte Alabama Court of Criminal Appeals to accept the subsequent notice of appeal was not sufficient as an adequate and independent state ground to preclude federal habeas relief because the state court's ruling was not made pursuant to a "firmly established and regularly followed state practice".

On March 14, 1994, the Eleventh Circuit denied Respondent's Motion for Rehearing.

REASON FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE DECISION OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT WHICH ALLOWS THE RESPONDENT TO HAVE HIS CLAIMS HEARD ON THE MERITS IN HABEAS RELIEF EVEN THOUGH THE STATE COURT HAD REFUSED TO HEAR THE CLAIMS IN AN APPEAL BECAUSE PETITIONER HAD PREVIOUSLY WITHDRAWN HIS NOTICE OF APPEAL. SINCE THE TIME AND MANNER OF PERFECTING AN APPEAL IS STRICTLY A STATE LAW QUESTION, AND DOES NOT INVOLVE ANY FEDERAL CONSTITUTIONAL QUESTION, THE RESPONDENT IS NOT ENTITLED TO FEDERAL HABEAS REVIEW OF THE STATE COURT'S DECISION TO DENY HIS MOTION TO REINSTATE HIS APPEAL.

This Petition for Certiorari raises the plain issue of whether the time and manner of perfecting an appeal from a state court conviction constitutes a question of state law which cannot be reviewed in federal habeas corpus, or a question of federal constitutional law which could be reviewed in a federal habeas petition. At the heart of this petition is the question of whether a defendant has a federal constitutional right to reinstate a timely given notice of appeal that had been voluntarily and

knowingly withdrawn for devious, tactical reasons.

By granting Respondent the right to proceed in federal habeas corpus despite the state court's refusal to entertain his appeal due to the motion to withdraw, the Eleventh Circuit implicitly holds that question of whether a defendant has properly perfected an appeal from conviction is a federal constitutional question and that the failure to perfect an appeal due to procedural default can be excused for good cause.

This holding by the Eleventh Circuit is seemingly in conflict with Brown v. Allen, 344 U.S. 443 (1953) and Coleman v. Thompson, 501 U.S. 722 (1991). In Brown, this Court treated the defendant's failure to file his statement of the case within the time required by the state appellate as an issue of state law and this Court refused to review the state court's decision in a writ of certiorari. In pertinent part, the court in Brown stated:

> "After the refusal of the first coram nobis petition, the Supreme Court of North Carolina dismissed

petitioners' attempted appeal on the record proper on the ground that no case on appeal had been filed....

The failure to perfect the appeal came in this way. Upon the coming in of the verdict on June 6, 1949, the petitioners several times moved for a new trial, in each motion reiterating one or the other of the aforementioned federal questions. These motions were denied, and the trial court pronounced its sentence. Petitioners excepted to the judgments and noted appeals therefrom to the State Supreme Court. In response to petitioners' notice, the trial judge granted petitioners 60 days in which to make and serve a statement of the case on appeal. When counsel failed to serve this statement until 61 days had expired, the trial judge struck the appeal as out of time. This action precluded an appeal as of right to the State Supreme Court....

....Failure to appeal is much like a failure to raise a known and existing question of unconstitutional proceeding or action prior to conviction or commitment. Such failure, of course, bars subsequent objection to conviction on those grounds.

North Carolina has applied its law in refusing this out-of-time review. This Court applies its jurisdictional statute in the same manner. Preston v. Texas, 343 US 917, 933, 96 L ed 1331, 72 S Ct 649; cf. Paonessa v. New York, No. 133 Misc, this Term, certiorari denied October 20, 1952 [344 US 860, post, 667, 73 S Ct 99], because "application therefor was not

> made within the time provided by law." We cannot say that North Carolina's action in refusing review after failure to perfect the case on appeal violates the Federal Constitution. A period of limitation accords with out conception of proper procedure." [Emphasis Added]

Id at 484, 485, 486.

Because Brown is clear on the question that rules regarding perfection of an appeal from a state court conviction is strictly an issue of state law, the Eleventh Circuit exceeded the scope of federal habeas corpus in this case by granting Respondent the right to seek habeas relief even though the state court has refused to accept his subsequent motion for notice of appeal on the ground that it was "untimely." The Eleventh Circuit should have affirmed the district court's denial of habeas relief upon the ground that it had no authority to grant relief on this petition.

In Coleman v. Thompson, the Court refused to review the Virginia Supreme Court's dismissal of defendant's appeal because the dismissal had been based upon the defendant's failure to file

a timely notice of appeal. The Court held that the state's appellate rules were based "primarily on state law," and the Court declined to review the habeas claims on the merits becuase the untimely notice of appeal constituted a procedural default under state law.

As in Brown and Coleman, where the state courts had held that the defendants had untimely failed to appeal, the Alabama Court of Criminal Appeals held that Respondent's subsequent notice of appeal was "untimely". Since the timeliness of an appeal is governed only by an interpretation of the state appellate rules, no question of federal constitutional dimension was presented to the Eleventh Circuit and thus the granting of the right to proceed in habeas corpus was clearly error.

(B)

NOTHING IN THE ALABAMA RULES OF APPELLATE PROCEDURE LED PETITIONER TO BELIEVE THAT HE COULD REINSTATE A DISMISSED NOTICE OF APPEAL.

It should be noted that Petitioner was not misled into believing that he could revive a dismissed appeal. No action of the state or any reasonable interpretation of the rules of appellate procedure gave Respondent reason to believe that a subsequent notice of appeal could be given at a later date. Respondent was motivated by his own devious reasons -- to avoid representation by counsel who had been appointed to prosecute the appeal -- in dismissing the appeal. This is clearly a factor that should weigh against him in deciding whether he had a constitutional right to reinstate his appeal.

(C)

THE QUESTION OF WHETHER A CRIMINAL DEFENDANT HAS A CONSTITUTIONAL RIGHT TO REINSTATE A VALID NOTICE OF APPEAL WHICH HAD BEEN VOLUNTARILY DISMISSED IS AN IMPORTANT QUESTION WHICH HAS YET TO BE DECIDED BY THIS COURT.

Although this Court has already decided that a criminal defendant has an equal protection and due process right to an appeal if the State allows appeals for other defendants, Griffin v. Illinois, 351 U.S. 12 (1956), this Court has never decided whether a criminal defendant, who gives a valid notice of appeal within the time allotted by state law, and then voluntarily withdraws the notice of appeal, is constitutionally entitled to have his notice of appeal reinstated. Respondent requests that the Court grant certiorari so that this issue can be fully briefed.

II.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE IF A STATE COURT'S RULING MUST BE MADE PURSUANT TO A WRITTEN PROCEDURAL RULE OR BASED UPON A PRIOR CASE DECISION IN ORDER FOR THE RULING TO BE CONSIDERED A "FIRMLY ESTABLISHED AND REGULARLY FOLLOWED STATE PRACTICE."

As a basis for its decision that Respondent should be permitted to have his habeas corpus claims heard on the merits, the Eleventh Circuit held that the state court's denial of the right to reinstate the appeal was not based upon a "firmly established and regularly followed state practice" as required by Ford v. Georgia, 498 U.S. 411 (1991), and thus, the state court's ruling would not constitute an adequate and independent state ground to bar federal habeas relief. The Eleventh Circuit held that it would not be adequate because the state court's ruling was based upon a "novel procedural requirement" and that there was nothing in the state appellate or criminal rules that hold that a voluntary dismissal of an appeal would bar a second appeal.

This ruling by the Eleventh Circuit clearly misapplies the "firmly established and regularly followed" requirement. In the cases decided by this Court, that term was applied to situations where a state court had either applied a state procedural rule in an "irregular, arbitrary, or inconsistent manner", Swaggart v. California Equalization Bd., 493 U.S. 378 (1990), had applied a new procedural rule to a case pending on appeal where the rule was not in effect during the trial, Ford v. Georgia, 498 U.S. 411 (1991), or had failed to clearly and consistently adhered to procedural distinction between "admonitions and instructions". James v. Kentucky, 466 U.S. 341 (1984). In each instance, this Court made a finding that the procedural ruling would not be honored because the procedural rule had been applied inconsistently or unfairly.

To the contrary in the present case, the Eleventh Circuit did not find that the Alabama Court of Criminal Appeals had arbitrarily denied Respondent the right to re-instate his appeal or

arbitrarily declined to accept his subsequent notices of appeal. The Eleventh Circuit made no finding that the Alabama Court of Criminal Appeals allowed defendants other than Respondent to re-instate their appeals.

Furthermore, the Eleventh Circuit erroneously held that the state court's ruling was "novel" or "arbitrary" merely because there was no evidence of how the Alabama Court of Criminal Appeals had ruled in other situations. This reasoning is faulty because it was never shown that the court ever had to make this ruling in any other case. This ruling by the Eleventh Circuit is in error and conflicts with the rulings of this Court which clearly require that a state court's application of a procedural rule be inconsistently applied before a federal habeas court can disregard the procedural default and entertain habeas claims.

CONCLUSION

It is obvious that the Eleventh Circuit Court of Appeals has misapplied habeas corpus

law as stated by this Court. The Eleventh Circuit, first, wrongly treated the State's refusal to accept Respondent's subsequent notice of appeal after he had withdrawn his first as a federal constitutional issue rather than as a state law issue.

Secondly, the Court misapplied the "firmly and established and regularly followed" rule because it never found that the state court arbitrarily or inconsistently denied Respondent the right to reinstate his of notice of appeal or accept a subsequent notice. The Court should review and correct the Eleventh Circuit's misapplication of Ford v. Georgia to the facts of this case.

Respectfully submitted,

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